No. 84-1442

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In the Supreme Court of the United States

OCTOBER TERM, 1984

AUGUST S. CARSTENS, FRIENDS OF THE EARTH, PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded (1) that substantial evidence supported the Nuclear Regulatory Commission's determination that the seismic design basis of the San Onofre Nuclear Generating Station, Units 2 and 3, was adequate to warrant the issuance of operating licenses for the facility; and (2) that the Commission had acted well within its discretion in making certain procedural rulings during the licensing hearing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 742 F.2d 1546.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1984, and a petition for rehearing was denied on November 7, 1984. The petition for a writ of certiorari was filed on February 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a full adjudicatory hearing in which petitioners participated, an Atomic Safety and Licensing Board (Licensing Board) of the Nuclear Regulatory Commission determined that the seismic design basis for Southern California Edison Company's San Onofre Nuclear Generating Station, Units 2 and 3, provides a reasonable assurance of

safety against earthquake hazards. Pet. Supp. App. 46-183. The Licensing Board, relying on testimony by several experts, found that an offshore, linked series of zones of deformations and faults known collectively as the Offshore Zone of Deformation (OZD) was the controlling geologic feature in this case. *Id.* at 68-69, 90-94. The Licensing Board rejected petitioners' unsupported claim that the OZD should be considered as a continuous or throughgoing fault capable of a rupture along its entire length of approximately 240 kilometers. *Id.* at 94. The Board further found that substantial evidence in the record supported the finding that postulation of an earthquake of magnitude 7 occurring on the OZD provided an adequate basis for the seismic design of the San Onofre facility. *Id.* at 105-108.

The Licensing Board also considered petitioners' claim that another nearby earthquake fault, the Cristianitos fault, was "capable."[1] After hearing the testimony proffered by petitioners on that issue, the Board ordered it stricken from the record. The Board concluded that the evidence lacked any probative value, "based upon the witness' sketchy qualifications as an expert, the superficiality and questionable accuracy of his pre-filed evidence, and his demeanor upon cross-examination." Pet. Supp. App. 61. In the alternative, the Licensing Board held that adjudication of the issue of the capability of the Christianitos fault was "foreclosed" to the extent the contention relied on pre-1973 evidence because that issue had been studied extensively during the 1973 construction permit proceeding for San Onofre. *Id.* at 63-67. Thus, the Board limited adjudication of the capability issue to post-1973 seismic events. The Licensing Board took evidence on the question whether the Cristianitos fault

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[1]The NRC's regulation defining "capable" faults (10 C.F.R. Pt. 100, App. A para. IV(a)(7)) is set out in the court of appeals' opinion at Pet. App. 7.

was associated with earthquakes in 1975 and 1977 and determined, based on uncontradicted expert witness testimony in the record, that those earthquakes were unrelated to the Cristianitos fault. *Id.* at 166-167.

Petitioners sought a stay from the Commission's Atomic Safety and Licensing Appeal Board (Appeal Board). The Appeal Board denied the stay and affirmed the Licensing Board in all respects save the Licensing Board's alternative holding that adjudication of the capability of the Cristianitos fault was "foreclosed" by its consideration in the 1973 proceeding. Pet. Supp. App. 184-210. But the Appeal Board concluded that this error was not prejudicial because it had neither precluded petitioners from presenting their entire direct case nor from cross-examining the applicant's witnesses on pre-1973 seismic activity. *Id.* at 193.

2. After unsuccessfully exhausting their remaining administrative remedies, petitioners sought review in the court of appeals. They contended that the Licensing Board had committed prejudical error by foreclosing their attempt to adjudicate the capability of the Cristianitos fault, that the Licensing Board had wrongly redecided the segmented nature of the OZD, that the choice of maximum design earthquake was not supported by substantial evidence, and that the Licensing Board had committed several procedural errors, especially in its interpretation of the Commission's regulation governing the timing of pre-hearing conferences (10 C.F.R. 2.752). The court of appeals rejected all of petitioners' contentions (Pet. App. 1-29).

The court of appeals first concluded that the Licensing Board had not "foreclosed" consideration of the capability of the Cristianitos fault. Rather, after having heard all of petitioners' proffered evidence on the issue, the Board acted well within its discretion in striking that evidence as nonprobative. Pet. App. 13-15. The court also held that the

Licensing Board had not improperly "redecided" the discontinuous nature of the OZD. Instead, the court agreed that the record showed that the Licensing Board had properly interpreted a stipulation by the parties to the earlier construction permit proceeding regarding the non-continuous nature of the OZD. *Id.* at 16-18. The court of appeals next affirmed the Licensing Board's finding that testimony by several experts provided substantial evidence in the record supporting the choice of a magnitude 7 earthquake as the appropriate design basis for San Onofre. *Id.* at 19. Finally, the court found no merit to petitioners' allegations of alleged unfairness by the NRC. *Id.* at 25. In particular, the court found "patently frivolous" petitioners' challenge to the NRC's regulation on the timing of pre-hearing conferences (10 C.F.R. 2.752), noting that petitioners had omitted from their citation of the regulation critical language providing the Licensing Board with discretion to set the time of a pre-hearing conference. Pet. App. 26-27.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Far from abdicating its responsibility to take a hard look at the NRC's decision, the court of appeals, in a comprehensive decision, explained in detail why the record of the agency proceedings supported the NRC's grant of an operating license for San Onofre and did not support any of petitioners' allegations.[2] On the other hand, to the extent

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[2]There is no merit to petitioners' suggestion (Pet. 38) that the record contains a combination of "danger signals" indicating that the NRC had not taken a hard look at the salient problems. The "danger signals" enumerated by petitioners are simply their allegations of error, all of which were rejected by the court of appeals.

that petitioners challenged the scientific and technological basis underlying the seismic design of San Onofre, the court of appeals correctly followed this Court's recent teaching that courts must be at their most deferential when reviewing technical determinations that are both at the frontiers of science and within the Commission's area of special expertise. *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87, 103 (1983). See Pet. App. 21.

Petitioners do not challenge the court of appeals' characterization of the seismic design of a nuclear power plant as a technical determination at the frontiers of science (Pet. App. 21). Instead, in an attempt to avoid the effect of this Court's decision in *Baltimore Gas & Electric Co.*, they contend that the NRC, after reviewing the seismic design for over 80 operating nuclear power reactors, still has no expertise in this area. See, *e.g.*, Pet. 28-30. The argument is patently frivolous, and, in any event, it fails to explain on what basis the courts could reasonably second-guess the agency established by Congress for the express purpose of deciding these difficult issues.[3]

2. As for alleged irregularities in the proceedings before the NRC, petitioners basically repeat the arguments they made below and contend that the court of appeals erred by not ruling in their favor. These issues involve narrow disputes concerning interpretation of the NRC's procedural regulations, differences of opinion over the meaning of earlier NRC decisions in this proceeding, and challenges to

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[3]Petitioners also suggest (Pet. 47) that *Baltimore Gas & Electric Co.*'s principle of deference is limited to agency decisions intended to have a limited life and involving uncertainty in only one aspect of a comprehensive decision. Even if *Baltimore Gas & Electric Co.* were so limited, it would still apply to this case. A determination of seismic design is always open to reconsideration based on new information. 10 C.F.R. 2.206. And uncertainty in the ground motion due to earthquakes is only one element in the consideration of seismic design, which in turn is only one element in the overall design of a nuclear plant.

the NRC's discretion to determine the competence of expert witnesses. All of petitioners' challenges were correctly decided by the court of appeals in accordance with well-established principles of law and do not present any issues warranting this Court's review.

For example, petitioners erroneously contend that the court of appeals sanctioned the NRC's alleged failure to determine whether the Cristianitos fault was capable of earthquake activity. The court of appeals explicitly dismissed petitioners' claim that they had been "foreclosed" from adjudicating the issue, finding instead that petitioners' evidence had been admitted and then struck as lacking in probative value. Pet. App. 13. The court reviewed the NRC's reasons for striking the testimony and properly found that the NRC had exercised its discretion reasonably. *Id.* at 13-15. Moreover, the court found, contrary to petitioners' allegations, that the record contains uncontested evidence, including determinations by the NRC staff, that the Cristianitos fault has been inactive for over 125,000 years. *Id.* at 15.[4]

Petitioners also are incorrect in their contention (Pet. 51-52) that the court of appeals did not understand the meaning of the evidence regarding the segmented character of the OZD. The court of appeals thoroughly considered the issue and explained that the record testimony of an expert from the United States Geologic Survey fully supported the NRC's interpretation of earlier USGS testimony on the OZD. Pet. App. 16-18.

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[4]It is this finding of capability *by the NRC staff* that is required by the regulations that petitioners reference (Pet. 36-37, 49-50). The regulations do not require such a finding by a Licensing Board.

Finally, there is no merit to petitioners' contention that the court of appeals erred in affirming the Commission's interpretation of its rule on the timing of pre-hearing conferences. 10 C.F.R. 2.752. Petitioners' repetition of the argument they advanced below (Pet. 61-64) fails to address the court of appeals' observation (Pet. App. 26-27) that petitioners omitted part of the regulation in attempting to interpret it to their own liking.

In sum, the court of appeals correctly concluded that "[a]n examination of the entire record in this case demonstrates that petitioners were given a full and fair opportunity to present their arguments before the Commission, and that the Commission has fully complied with the procedures mandated in the applicable statutes and regulations." Pet. App. 29. Petitioners have advanced no basis for doubting that conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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